Supreme Court, U.S.
FILED
JAN 2 2002
CLERK

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No. 01-706

IN THE

Supreme Court of the United States

Rex R. Sprietsma, Adm'r of the Estate of
Jeanne Sprietsma, Deceased,

Petitioner,

v.

Mercury Marine, a Division
of Brunswick Corporation,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Illinois

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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ARGUMENT

As explained in our petition for *certiorari*, this case presents the identical question that was before this Court in *Lewis v. Brunswick Corp.*, 107 F.3d 1494 (11th Cir., *cert. granted*, 522 U.S. 978 (1997), *cert. dismissed*, 523 U.S. 1113 (1998): whether a state common-law claim that a boat engine was defectively designed because it lacks a propeller guard is preempted by a decision of the United States Coast Guard not to begin developing a regulation that would require the use of propeller guards on recreational motor boats. *Lewis* settled after oral argument, before any decision was rendered in the case. This is the first meaningful opportunity for this Court to revisit this important question of federal law in the wake of *Lewis*.

Mercury Marine's main theme in opposition is that review should not be granted because decisions of this Court since *Lewis* was argued – particularly *Geier v. Am. Honda Motor Co.*, 529 U.S. 861 (2000), and *United States v. Locke*, 529 U.S. 89 (2000) – have "definitively resolved" the core questions presented in this case and discredited the conflicting decision of the Texas Supreme Court in *Moore v. Brunswick Bowling & Billiards Corp.*, 889 S.W.2d 246 (Tex.), *cert. denied*, 115 U.S. 664 (1994). As we now explain, these arguments are meritless.

1. Neither *Geier* nor *Locke* Resolved the Federal Preemption Question Presented in *Lewis* and this Case.

A. *Geier*'s Implied Preemption Holding Has No Bearing Here.

Mercury Marine's principal claim is that *Geier* repudiated the Texas Supreme Court's decision in *Moore*,

thereby effectively eradicating the split of authority that gave rise to the grant of *certiorari* in *Lewis*. In so arguing, Mercury Marine mischaracterizes *Geier* as holding that "allowing a jury to require auto makers to install airbags would frustrate the purpose of a federal decision *not* to install an airbag requirement." Opp. at 15 (citing *Geier*, 529 U.S. at 881; emphasis in original). Based on this mischaracterization of *Geier*, Mercury Marine claims that the U.S. Coast Guard's decision "*not* to impose [a propeller guard] requirement" must be accorded similar preemptive effect. *Id.*

The main flaw in this analogy is that, unlike the decision at issue here (a decision by the federal government to take *no* regulatory action at all), *Geier* involved a highly complex federal safety standard that did, in fact, regulate the use of airbags. In *Geier*, this Court confronted the 1984 version of a federal motor vehicle safety standard promulgated by the National Highway Traffic and Motor Vehicle Safety Administration ("NHTSA") – Standard 208 – that required auto manufacturers gradually to "phase-in" the use of passive restraint devices in passenger automobiles. Unlike the typical minimum safety standards promulgated by NHTSA, Standard 208 "deliberately sought variety . . . by setting a performance requirement for passive restraint devices and allowing manufacturers to choose among different passive restraint mechanisms, such as airbags, automatic belts, or other passive restraint technologies to satisfy that requirement." 529 U.S. at 878. The Court emphasized that NHTSA sought a "mix of devices" because of safety concerns associated with airbags. *Id.* at 878-79. *Geier* further stressed that, in NHTSA's view, a "mix of devices would help develop data on comparative effectiveness, would allow the industry time to overcome the safety problems and the high production costs associated with

airbags, and could facilitate the development of alternative, cheaper, and safer passive restraint systems." *Id.* at 879.

Against this backdrop, *Geier* held that a common-law damages action holding a manufacturer liable for its failure to install an airbag would conflict with NHTSA's goal of encouraging a mixture of passive restraint devices. *Id.* at 880. The Court wrote that "a rule of state tort law imposing [liability for failure to install airbags] . . . would have presented an obstacle to the variety and mix of devices that the federal regulation sought." *Id.* In so ruling, *Geier* gave "special weight" to an *amicus curiae* brief filed by the United States, in which the agency strenuously argued that no-airbag claims would conflict with and substantially undermine NHTSA's regulatory goals. *See id.* at 886.

The facts here could not be farther from those in *Geier*. Unlike the complex set of regulatory obligations imposed by Standard 208, which affirmatively encouraged a mixture of passive restraint devices, *there is no federal regulation whatsoever governing propeller guards.* As previously explained, the only action taken by the Coast Guard with regard to these devices was to task a subcommittee of its Advisory Council (which included, among others, industry representatives and members of the public) with investigating whether the federal government should begin to develop a regulation requiring propeller guards on passenger boats. *See* Pet. at 5. The Coast Guard ultimately decided not to regulate these devices in any way, in part because there was no universally applicable technology appropriate for use on all boats. *Id.* at 6. To date, there is no federal safety standard governing (or even addressing) the use of propeller guards. Thus, unlike in *Geier*, there is no federal regulatory framework

with which petitioner's common-law claims could possibly conflict.

This conclusion is underscored by the fact that, in *Lewis*, the United States filed an *amicus curiae* brief confirming that no-propeller-guard claims exactly like petitioner's do not in any way conflict with federal regulatory purposes. *See* Brief for the United States as *Amicus Curiae* Supporting Petitioners, Lewis v. Brunswick Corp., 522 U.S. 978 (1997) (No. 97-288) ("*Lewis* Brief"). This position stands in stark contrast to the United States' *amicus curiae* brief in *Geier*, which vigorously asserted that no-airbag claims would frustrate and undermine the goals of Standard 208. *See* 529 U.S. at 880. And *Geier* itself confirms that the Solicitor General's views on the preemptive effect of an agency's regulatory decisions are entitled to some deference. *Id.* at 882, 886. *See also Medtronic v. Lohr, Inc.*, 518 U.S. 470, 496, 505-07 (1996) (majority and concurring opinions). Thus, if anything, *Geier* provides further reason to grant review and accord the United States' authoritative position the deference it deserves.[1]

[1] Mercury Marine attempts to avoid the United States' anti-preemption position in *Lewis* by arguing that the Solicitor General's reasoning, like that of the Texas Supreme Court in *Moore*, has been discredited by *Geier*. *See* Opp. at 24-25. This argument is meritless. First, the *Lewis* Brief's suggestion (at 21) that the Boat Safety Act's savings clause "makes clear Congress's explicit intent to preserve tort liability" is, contrary to respondent's claim, in no way contrary to *Geier* and ultimately irrelevant to the United States' rejection of preemption, which hinged on the fact that there is clearly no conflict between no-propeller-guard claims and the Coast Guard's regulatory purposes. *Id.* at 25-27. Second, the *Lewis* Brief's recognition (at 22) that the "regulatory effect of a common law judgment is not as direct as that of positive enactments or prescriptions" is, in fact, supported by ample authority and is wholly consistent with *Geier*. (As explained *infra* at 7-8, *Geier* explicitly acknowledged, and did not

B. *Locke*'s Preemption Holding is Equally Inapplicable to this Case.

Mercury Marine also argues that "any remaining issue presented in *Lewis* was disposed of in *Locke*," which stated that there are "instances in which state regulation of maritime commerce is inappropriate even absent the exercise of federal authority." Opp. at 16. *Locke*, however, did little more than reaffirm this Court's previous holding in *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978), that Title II of the Ports and Waterways Safety Act of 1972 ("PWSA") expressly preempts the entire field of state laws and regulations governing ocean-going oil tankers used in international commerce.[2] Within the context of a field preemption statute like the PWSA, it made sense for this Court to "reaffirm" that regulatory inaction may exert a preemptive effect on state law. This holding has virtually nothing to do with this case, however, given that the

purport to overrule, numerous prior decisions of this Court making precisely this point.) Third, the *Lewis* Brief's argument (at 28) that, absent a statute that affirmatively preempts the entire field of state action, regulatory inaction lacks preemptive effect, is fully consistent with *Geier*, given that *Geier* did not involve a "field preemption" statute and did not involve regulatory inaction. In short, *Geier* did not undermine the validity of any of the arguments set forth in the Lewis Brief, and Mercury Marine's arguments to the contrary are simply wrong.

[2] As the Supreme Court explained in *Ray* (and reiterated in *Locke*), Title II of the PWSA *requires* the Coast Guard to issue "such rules and regulations as may be necessary with respect to the design, construction, and operation of the covered vessels." *Ray*, 435 U.S. at 168; *Locke*, 529 U.S. at 110. *Ray* and *Locke* both reasoned that, given Title II's mandatory directive that the Coast Guard impose national regulations governing the general seaworthiness of tankers and their crews, "Congress has left no room for state regulation of these matters." *Locke*, 529 U.S. at 110.

Boat Safety Act, unlike the PWSA, does *not* preempt the field of boat safety.

As explained by the United States in *Lewis*, the Boat Safety Act "is quite distinctive from the [PWSA]" insofar as it "does not require the [Coast Guard] to issue regulations, but rather merely permits [the agency] to do so." *Lewis* Brief at 29. *See also* 46 U.S.C. § 4302(a). As the United States concluded, this grant of permissive regulatory authority reveals that Congress never intended the Act to preempt the entire field of boat safety regulation, given that the Coast Guard has the option of doing *nothing* under the Act (and, in fact, has not issued any regulations governing propeller guards). Because the Boat Safety Act does not preempt the regulated field, *Locke*'s language regarding the preemptive effect of regulatory inaction has no bearing here: unlike the PWSA, the Boat Safety Act only preempts state positive law in areas where the Coast Guard has issued regulations governing the subject matter at issue – and it is undisputed that no such action has been taken with respect to propeller guards. Thus, Mercury Marine's suggestion that *Locke* resolves the preemption question presented here has no merit.[3]

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[3] Assuming, however, that the Boat Safety Act (like Title II of the PWSA) preempts the field of state positive law even where the Coast Guard has taken no regulatory action, *Locke*'s holding would still have no bearing here given that common-law claims are expressly preserved by the Act's broadly worded savings clause. *See* 46 U.S.C. § 4311(g). In this respect, this case is very different from both *Ray* and *Locke*, which involved state regulations rather than common-law claims. As the United States explained in *Lewis*, "[t]hat distinction is equally important here, because the [Act] contains a savings clause, but the PWSA, at issue in *Ray*, did not." *Lewis* Brief at 29.

2. *Moore* is Still Good Law, and Directly Conflicts with the Decision Below.

Equally without merit is Mercury Marine's claim that "there is no genuine conflict" between the decision below and the Texas Supreme Court's decision in *Moore*. *See* Opp. at 17. Mercury Marine argues, first, that *Moore* is no longer good law because its holding that "the presence of an express preemption clause precluded a finding of implied preemption" was rejected by *Geier*. *Id.* *Moore*'s holding on this point is irrelevant, however, because the Texas Supreme Court went on to reach the same implied conflict preemption question presented here: whether "a jury award in this case will conflict with and undermine the goals of the Act by creating a standard requiring propeller guards, in the face of the Coast Guard's policy determination that guards should not be mandated." *Id.* at 251.

Mercury Marine is also wrong in claiming that *Moore*'s holding that "damage awards" are "not equivalent to . . positive enactments" conflicts with this Court's prior teachings and was definitively rejected by *Geier*. Opp. at 18. In reality, *Moore*'s holding on this point is squarely in accord with numerous prior decisions of this Court recognizing that "the effects of direct regulation . . . are significantly more intrusive than the incidental regulatory effects of [damage awards]." *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 185-86 (1988). *See also Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 518 (1992) ("there is no general, inherent conflict between [express] federal pre-emption of state [regulatory] warning requirements and the continued vitality of state common law [damages] actions") (plurality); *id.* at 533-34 (Blackmun, J., concurring); *English v. General Electric Corp.*, 496 U.S. 72, 85 (1990) (common-law claims "neither direct nor substantial enough" to be within the preempted field"); *Silkwood v. Kerr-McGee Corp.*, 464 U.S.

238, 256 (1984) ("Congress intended . . . to tolerate whatever tension there was between [federal regulation and state common-law claims, and] [w]e can do no less.").

Notably, *all* of these cases were cited in *Geier*, which explicitly acknowledged this Court's oft-repeated teachings that the effects of "tort law may be somewhat different" than those of positive law for purposes of determining the extent of federal preemption. *See* 529 U.S. at 882. And *Geier*'s particular holding that the "rules of law that judges or juries create or apply in [tort] suits" may remove a choice that federal regulators intended to preserve has no bearing here, given that the Coast Guard has made crystal clear that it never intended even to address any aspect of manufacturers' decision making with respect to propeller guards. In short, *Moore* remains good law after *Geier*, and is squarely in conflict with the decision below.[4]

[4] Mercury Marine also claims that *Moore* was wrong because it applied a presumption against preemption that was subsequently rejected in *Locke*. *See* Opp. at 18. As explained in our petition, however, there are myriad reasons why *Locke*'s rejection of the presumption against preemption – a holding directed to state regulation of ocean-going oil tankers involved in international maritime commerce – should not apply to a case involving a small recreational vessel on local waters. *See* Pet. at 21-23. Even assuming that the Texas Supreme Court erred in this regard, however, its preemption ruling was still correct, given that the Coast Guard has never regulated propeller guards and the United States itself has taken the position that no-propeller-guard claims do not undermine or frustrate any federal policy.

3. This Case is a Proper Vehicle for Review.

Finally, there is no merit to Mercury Marine's argument that this case is not a proper vehicle for review on the grounds that (1) "petitioner could not recover under state tort law even if his claim were allowed to proceed"; and (2) this Court's jurisdiction is "questionable" due to the pendency of remaining claims against the boat's manufacturer. *See* Opp. at 29. Regarding the former, suffice it to say that the alleged weaknesses of petitioner's claims on the merits (which is a subject of hot dispute and belied by the fact that other injury victims in similar cases have obtained significant recoveries) is hardly a valid reason to decline review. Regarding the jurisdictional argument, the Illinois Supreme Court affirmed judgments dismissing petitioner's claims on the ground that they are preempted by federal law. Mercury Marine neither disputes that this is a final judgment between the parties to this appeal nor produces any authority for the argument that petitioner's claims against other defendants not party to this appeal render the Illinois Supreme Court's dismissal ruling unreviewable under 28 U.S.C. § 1257. In *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 480 (1975), this Court recognized its jurisdiction to review a state court decision where "the federal issue, finally decided by the highest court in the state, will survive and require decision regardless of the outcome of future state-court proceedings." *See also Brady v. Maryland*, 373 U.S. 83 (1963) (reviewing federal question arising out of criminal conviction before sentencing because sentence would not moot issue). This well-recognized exception to any requirement of technical finality that Section 1257 otherwise might impose plainly applies here, especially given that Mercury Marine will not even be a party to the only remaining state court proceedings it identifies. Respondent's preemption

defense is thus guaranteed to survive these proceedings as a live issue in this case, and the case is properly presented for review.

CONCLUSION

This petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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